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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1276

ELIZAVETA DANILA, NICOLAE DANILA, ELEANORA CATUT, ILENA POPESCU, GHEORGHE POPESCU, BUNEA POPESCU and IOAN POPESCU,

Petitioners,

vs.

GEORGE DOBREA,
Executor of the Estate of
John Danila, deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To Supreme Court of Ohio.

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PETITION FOR A WRIT OF CERTIORARI To Supreme Court of Ohio.

The Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above entitled case on January 24, 1968.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion and judgment of the Probate Court is unreported and is printed in Appendix A hereto. The decision of the Court of Appeals for the Ninth District of Ohio is unreported and is printed in Appendix B hereto. The judgment of the Supreme Court of Ohio is unreported and is printed in Appendix C hereto.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on January 24, 1968. Rehearing was denied on February 14, 1968, Appendix C. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3).

THE MANNER IN WHICH THE FEDERAL QUESTIONS ARE RAISED.

The petitioners sought review in the Supreme Court of Ohio of the decision of the Court of Appeals of Ohio affirming, per curiam, the judgment of the Probate Court, whereby the statutory rights of these petitioners were extinguished in violation of due process of law.

The right to a review by the Supreme Court of Ohio is dependent upon the discretion of the court in determining that the case is one of public or great general interest, or that a substantial constitutional question is involved, Rules of Practice of the Ohio Supreme Court, Rule I, Sec. 1A (a) (b) (c), Rule II, Sec. 3, printed in Appendix D hereto.

The petitioners sought review of the decision of the Court of Appeals by means of a motion in the Supreme Court of Ohio requesting it to direct the lower appellate court to certify its record to the Supreme Court for review, and as an appeal of right on the ground that the decision of the Court of Appeals of Ohio violated their constitutional rights as guaranteed to them by Article I, Section 16, of the Ohio Constitution, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Ohio denied the motion to certify and rejected the appeal as of right on the basis that no substantial constitutional question is involved.

The petitioners applied to the Supreme Court of Ohio for a rehearing, urging that the judgment below is so offensive to the common and fundamental ideas of fairness, as to amount to a denial of due process of law. The application was denied on February 14, 1968.

QUESTIONS PRESENTED.

1. Are the orders of a Probate Court approving the final account of the executor (the respondent), and withholding payment of the distributive shares of the specific legatees (the petitioners), through the appointment of the respondent as trustee of such shares, with no notice to the legatees whose addresses were known and/or to their legal counsel of record, except by publication, in accordance with due process of law?

2. Have the petitioners been denied due process and the equal protection of the laws as secured to them by the Fourteenth Amendment to the Constitution of the United States as a result of the Probate Court's refusal to recognize and respect the function and the authority of their legal counsel of record?

STATUTE INVOLVED.

Section 2109.35(A)(C) of the Revised Code of Ohio involved herein is set out in Appendix E, *infra*, pp. 21-22.

STATEMENT.

John Danila died testate on June 27, 1964. His will was prepared by counsel for the executor, respondent herein, and also counsel for one of the churches which was named a residuary legatee. The priest of said church-legatee was a witness to the will.

The respondent was designated as the executor in the will, and thereupon, was appointed as such by the court.

The decedent, John Danila, had no relatives in the United States. All the natural objects of his bounty, these petitioners—his blood relatives—are in Romania. With regard to them, his will provided as follows:

> "Item III. I direct my executor to distribute equally all the monies remaining under my name on deposit at City Bank Co. of Lorain, Ohio, National Tube Company Credit Union and The Pioneer Savings and Loan Company of Cleveland, Ohio, to the following persons: Elizaveta Danila, my sister-in-law, now a resident of the village of Solojeni, Region of Oltenia, Romania; Nicolae Danila, nephew, now a resident of the village of Solojeni, region of Oltenia, Romania; Eleanora Catut, niece, last known address, Targu Tiu, Region of Oltenia, Romania; Ileana Popescu, niece, a resident of the village of Bradiceni, region of Oltenia, Romania; Gheorghe Popescu, son of my niece, Ileana Popescu, a resident of the Village of Bradiceni, region of Oltenia, Romania; Bunea Popescu, son of my niece, Ileana Popescu, now a resident of the Village of Bradiceni, region of Oltenia, Romania; Ioan Popescu, son of my niece, Ileana Popescu, a resident in the village of Bradiceni, region of Oltenia, Romania."

The total of the specific legacies, hereinabove provided, was $40,544.33

The will provided further that the rest and residue, consisting of stocks and bonds, which was the substantial part of the estate, was to be divided equally among three strangers to the testator—Elizabeth Gall, The St. Mary's Romanian Orthodox Church of Cleveland, Ohio, and St. Basil's Romanian Greek Catholic Church of Lorain, Ohio. The decedent was not a member of the beneficiary churches, and, in fact, never knew of or attended St.

Mary's Church in Cleveland. Elisabeth Gall was a mere acquaintance of the decedent.

The first notification which the petitioners, who are all residents of Romania, received about the death of John Danila, was about four months after his death by means of a letter addressed to them by the attorney for the respondent (Exhibit 4e). In this letter, the attorney for the respondent wrote, among other things, as follows:

> "As soon as the administration of the estate is completed, the administrator at the direction of the Probate Court, shall send you the money just as your uncle wished. We shall notify you at the appropriate time. * * * *It will not be necessary that any of you seek legal intervention in order to receive the money inasmuch as the Court here shall direct when and how it shall be sent."* (Italics ours.)

The respondent never sent the petitioners a copy of the will and never informed them about the nature and the amount of the estate, although repeatedly requested to do so. One of the petitioners declared, relevant hereto (Exhibit 4), as follows:

> "I am not informed about the nature of or about the proceedings connected with the administration of my aforesaid uncle's estate, and neither do I know about the entire testamentary disposition of his estate. * * * I have written three letters to attorney John Sibisan of Cleveland, Ohio, U. S. A., requesting that he send me a copy of the will and that he give me an accounting of the exact nature and status of the estate left by my uncle, but to date (October 27, 1965) he has not answered my letters."

Another legatee (one of petitioners), Ileana Popescu (Exhibit 5a), stated:

> "I read the letter which was addressed on October 7, 1964, by attorney John Sibisan from Cleveland, Ohio

to my brother Nicolae Gh. Danila. As a result of said letter, I wrote two letters to attorney John Sibisan, giving him the addresses which he requested, requesting him to send us copies of the last will and testament of the decedent, John Danila, and that he inform us about the exact amount of the estate as well as its status of administration. Until the present time (January 6, 1966), I have not received any answer to the above mentioned letters from attorney John Sibisan or from the executor of the estate or from any other person."

On or about January 26, 1965, undersigned counsel for the petitioners telephoned the attorney for the executor, and informed him that he was legal counsel for the specific legatees in Romania, and shortly thereafter, said counsel submitted a formal appearance which was filed with the Probate Court on February 5, 1965. Immediately after the appearance of counsel of record for petitioners, the respondent, on February 7, 1965, prepared his final and distributive account which he filed with the Probate Court on March 4, 1965. In this final account, the executor charged all the debts, expenses and costs of administration in the total amount of $17,115.23, against the distributive shares of the respondents. The residuary estate was ordered distributed in kind, upon the misrepresentation of the respondent that all parties in interest have consented, although these petitioners had no knowledge whatsoever of that proceeding. Simultaneous therewith, the respondent applied to the probate court to be appointed trustee of the distributive shares of the specific legatees, in Romania, upon the sole ground and representation *"that the legatees and distributees of decedent's estate are all residents of Romania and time will be required to determine their exact residence."* In this connection, it is highly significant that the estate was closed in less than nine months, and

that such haste is extremely unusual and impractical in probate administration.

The attorney of record for the legatees, petitioners herein, was not informed or notified about the filing of the final and distributive account, nor did he receive a copy thereof, nor was he informed about the application to appoint a trustee for the distributive shares of the legatees in Romania. He also was not informed about the date of the hearing of the final account and of the application to appoint trustee, and neither he nor his clients, the specific legatees, had any knowledge, whatsoever, of the proceedings with regard to the final account and of the proceeding to appoint trustee in time to appear at the hearing thereof.

Upon learning of the actions of the respondent in closing the estate and in withholding payment of their distributive shares in full, the petitioners, through their local counsel, filed motions to vacate the order settling the final account, for leave to file exceptions thereto, and to remove the trustee. These motions came on for hearing on February 1, 1966, before the Probate Judge of Lorain County, Ohio. Thereafter, briefs were filed by counsel for the respective parties within the time limits agreed upon in open court. The judge failed to decide the motions after the lapse of more than eight months without any apparent reason, although repeatedly requested to do so. Upon the filing of an affidavit of prejudice, the judge voluntarily withdrew from the case. Thereupon, another hearing was had before a visiting judge assigned to the case, and, shortly thereafter, a decision was rendered overruling the motions of the petitioners.

Upon appeal to the Court of Appeals, the judgment below was affirmed (Appendix B).

The constitutional arguments herein were presented and urged vigorously from the inception in all proceedings before the state courts.

REASONS FOR GRANTING THE WRIT.

1. The fundamental right to the aid of legal counsel is an integral part of the constitutional safeguards accorded these petitioners by the Fourteenth Amendment to the Constitution of the United States.

The force and validity of the petitioners' contention that the decisions below were rendered in disregard of their constitutionally protected rights of due process and equal protection of the laws can best be evaluated in the context of various declarations of this Court in matters involving an attorney at law. In his concurring opinion in *Schware v. Board of Examiners*, 353 U. S. 232, 247, Mr. Justice Frankfurter stated as follows:

> "One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers. It is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' to quote Devlin, J., 'in the defense of right and to ward off wrong.' "

Mr. Justice Black declared in *Brotherhood of R. R. Trainmen v. Virginia*, 377 U. S. 1:

> "* * * laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, * * *."

And in *Gideon v. Wainwright*, 372 U. S., 335, Mr. Justice Black, in the delivery of the court's opinion, stated:

> "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designated to assure fair trials before impartial tribunals in which every defendant stands equal before the law."

To borrow from the words of Mr. Justice Black, "this noble idea cannot be realized" if the interests of a non-resident heir are dealt with in disregard of legal counsel retained by him to protect and preserve his rights. The rights accorded to foreign heirs by the probate laws of a state are of little avail if they do not comprehend the right to be represented by legal counsel.

In our case, the petitioners were not denied the right to legal counsel, outright, but, the effect was identical in view of the arbitrary refusal on the part of the fiduciary and the court to notify counsel of the various proceedings dealing with and affecting the rights of the petitioners.

The failure and/or refusal of the Ohio courts to recognize and respect the role of counsel for real parties in interest in the process of the administration of a decedent's estate is so offensive to the common and fundamental ideas of fairness, as to amount to a denial of due process of law. The attitude of the State courts of Ohio, regarding the function and role of a lawyer, as counsel of record for legatees, constitutes a denial of fundamental fairness, shocking to the universal sense of justice. "Like the court itself, an attorney is an instrument or agency to advance the ends of justice," 7 *Am. Jur.* 2d, Section 3, Attorneys at Law. Certainly, a judicial tribunal, such as the probate court below, which deliberately ignores the official appearance of an attorney for specific legatees, and especially non-resident parties, is guilty of violating fundamental rights.

2. The deliberate refusal of the respondent to notify counsel of record for the specific legatees of the filing of his final account, of his application for appointment as trustee of the distributive shares of the said legatees, or to notify the specific legatees or their counsel of his actions affecting

their rights, renders all orders of the court affecting the rights of the petitioners constitutionally invalid.

The probate court is charged by law with the duty of preserving and protecting the rights of all heirs, devisees and beneficiaries of decedents' estates. Basic thereto, is the correlative duty to notify all parties in interest of each and every proceeding which may affect their rights, and to afford them an opportunity to appear to protect their rights.

The Ohio Supreme Court has held that an executor or administrator acts for the Probate Court in the performance of its administrative duties, *In Re Estate of LaPenta*, 165 Ohio St., 538. The Ohio court went on to state, relevant hereto: "The court had a duty to have and thus an interest in having the estate distributed to the rightful heirs * * * and also a duty to have and an interest in having no partiality toward any one who claimed to be such."

What are the minimal requirements of due process with regard to notice and opportunity to appear?

Murphy v. Helena Rubenstein Co., 234 F. Supp. 893, page 596:

> "The demands of due process required by the Fourteenth Amendment are such as accord with the traditional concept of fair play, substantial justice, and a resolution of controversy upon the merits. These are the very pillars of Anglo-Saxon law. It is to this end that minimal procedural due process requirements must be met, not only in subjecting a party to a suit, but as well and with like equality of treatment before the law, affording such party an opportunity to defend. *But defense of such an action by its very terms implies adequate notice. Consequently, procedural due process requires adequate notice.*" (Italics ours.)

This Court had occasion to enunciate the applicable rules of due process concerning notice. In *Mullane v. Central Hanover Bank*, 339 U. S., 306, the court ruled that even notice by publication as authorized by state statute may be insufficient to satisfy due process. Pertinent hereto, the court (pp. 314, 315) stated:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality, is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v. Meyer, 311 U. S. 457; Grannis v. Ordean, 234 U. S. 385; Priest v. Las Vegas, 232 U. S. 604; Roller v. Holly, 176 U. S. 398. The notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, supra, and it must afford a reasonable time for those interested to make their appearance, Roller v. Holly supra, and cf. Goodrich v. Ferris, 214 U. S. 71."

> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

Subsequent thereto, the Court followed the Mullane decision in a similar problem involving notice, and declared in *Schroeder v. City of New York*, 371 U. S. 208, 212:

> "The general rule that emerges from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings."

It is established, therefore, that in order to satisfy the constitutional requirements of due process in any proceeding, such notice must be given as is "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Moreover, "this right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank.*

The record in the instant matter clearly reveals that the due process requirements regarding notice and hearing were ignored deliberately. The rule enunciated in *Mullane* and followed in *Schroeder* states that only personal notice will satisfy due process "with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings." In our case, the names and addresses of the complaining legatees were known to or very easily ascertainable by the respondent. His failure and/or neglect to notify the specific legatees or their counsel of the various proceedings undertaken by him vitiates all the orders and decrees of this Court affecting their rights.

It must be emphasized that the respondent had the duty to notify the complaining petitioners of all proceedings undertaken by him wherein their interests may be affected. The appearance by an attorney benefits the court and its fiduciary in that it enables them to fulfill the due process requirement of notice. To ignore the appearance of an attorney representing interested parties, as was done in the instant case, is to disregard the constitutional obligation of due process of law.

CONCLUSION.

The decisions below are inconsistent with and in disregard of the constitutionally protected rights of these petitioners. The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. VINTILLA,

Counsel for Petitioners.

APPENDIX "A."

OPINION OF PROBATE JUDGE.

The will of John Danila, a native of Romania, but then living in Lorain County, Ohio, was drafted and signed on June 16, 1964. By his will, he:

1. directs the payment of his debts,

2. gives certain direction as to his burial,

3. directs the equal distribution among seven relatives, all residents of Romania, of the "moneys *remaining* under my name on deposit" in three financial institutions and with reference to that bequest the will says:

> "In the event that my said executor, at his own discretion is convinced that the distribution made to the aforementioned relatives should be made beyond the closing date of my estate, it is my wish that he requests of the Probate Court of Lorain County to appoint a Trustee for the purpose of sending the share of my above-mentioned relatives in the amounts of not more than $100 (One Hundred Dollars) per month until the trust estate will be completely exhausted."

4. divide the "rest and residue" of his property one-third to an individual and one-third each to two religious organizations.

The last item of the will then reads as follows:

> "*Item V.* I make, nominate and appoint George Dobrea to be the executor of this, my last will and testament hereby authorizing and empowering my said executor to *compound, compromise, settle and adjust all claims and demands in favor of or against my estate, including inheritances taxes, succession taxes and court costs from the money deposited in banks.*" (Italics added.)

He died a resident of Lorain County on June 27, 1964, and on June 20, (*sic*) 1964, an application to probate the

will was filed in the Probate Court of that county, an order was entered admitting the will to probate and George Dobrea was appointed executor.

The will was prepared by attorney John J. Sibisan of Cleveland and the executor at all times has been, and still is, represented by him.

The inventory discloses that the only accounts in financial institutions belonging to this decedent at the time of his death were the three accounts referred to in the third item in the will. These three accounts totaled $40,-544.33.

The executor paid the debts and costs of administration, the inheritance tax (at least in part) and the estate taxes from these three accounts. The other assets of the estate, consisting of securities, were all distributed in kind to the residuary legatees.

On January 13, 1965, an application was filed to determine the Ohio inheritance taxes which reflected this allocation of assets and the inheritance taxes were computed by the court on that basis. The consent and waiver of the Tax Commission was received on February 3, 1965, and the certified copy of the journal entry determining those taxes was sent to the auditor on February 5, 1965.

On February 5, 1965, the appearance of John R. Vintilla as attorney for the seven legatees referred to in the third item of the will was noted of record.

Receipts showing the payment of the inheritance tax was filed February 20, 1965, and the executor's final account was filed March 4, 1965. By court order the account was set for hearing on April 10, 1965, and the publication of the notice required by Section 2109.32, followed. No exceptions to the account were filed but on April 10, it was continued without day. The reason for that continuance is not established but it was heard and approved on April 27, 1965.

Prior to the filing of the final account (on February 6, 1965) George Dobrea had filed, as Case No. 44406, an application to be appointed as testamentary trustee of the amounts to be payable to the Romanian legatees under the third item of the will. That appointment was made and it appears to be conceded that payments of $100.00 a month to each of the seven beneficiaries of this trust have been, and are now being made.

On January 14, 1966, a motion was filed on behalf of the seven legatees mentioned, seeking (a) an order vacating the April 27, 1965, approval of the final account with leave to file exceptions to that account and (b) an order terminating the trust.

Those motions were heard and submitted on December 7, 1965, and after consideration thereof the court concludes:

> (a) that these seven legatees were not "parties to the proceedings" relating to the final account within the meaning of Section 2109.35(B),
>
> (b) their motion having been filed well within time, they are entitled under Section 2109.35(B) upon, but only upon, a showing of "good cause" to a vacation of the April 27, 1965 order.

The principal point asserted on behalf of the legatees is that the debts of the estate, the costs of administration and the federal estate taxes, should have been paid out of the residuary estate. It is assumed here that if the validity of that proposition can be said to be even reasonably debatable, then the motion to vacate of the April 27, 1965, order should be granted to the end that that issue may be considered fully upon its merits.

And it probably must be conceded that the debts and costs of administration, including federal estate taxes, are to be paid out of the residuary estate unless the will, rea-

sonably construed, makes other provision for their payment. Here:

(a) this will first directs the payment of the testator's debts and makes provision as to his burial and it then directs the equal distribution among seven individuals of that, but only of that, which "remains" in three specific accounts of the testator.

(b) the last item of the will then authorizes the executor to "settle * * * all claims and demands * * * against my estate, including inheritance taxes, succession taxes and court costs *from money deposited in banks.*"

(c) the three accounts referred to in subparagraph (a) above are the only assets of the decedent which could possibly be considered as "money deposited in banks."

The court therefore concludes that, by the only permissible construction, this testator's will did require that the debts, costs of administration, and taxes be paid from the three accounts in question.

It has been asserted also, that there was some irregularity in the proceedings relating to the distribution in kind of the securities to the residuary legatees. Were that true, which seems doubtful, it would not, in the court's opinion, be of any consequence to the other legatees.

The court finds no substance to the asserted claims of fraud and unfair dealings by the executor and his counsel or in the charge of irregularity in the appointment of the testamentary trustee.

Also, the court suggests, but does not decide, that the order appointing the testamentary trustee, having been made in a separate proceedings under a separate number, might more properly have been attacked by a motion in that proceedings instead of in Case No. 43653. It is as-

sumed here that this possible procedural defect may be waived as immaterial.

An order therefore may be entered denying the motion of January 14, 1966, in its entirety.

APPENDIX "B."

OPINION OF COURT OF APPEALS.

PER CURIAM:

On June 30, 1964, an application for probate of the will of one John Danila, who died June 27, 1964, was filed in the Probate Court of Lorain County, Ohio. In due course, the final account of the executor named in the will was filed with that court. Thereafter, notice by publication was duly made of a hearing for approval of such account. The resident legatees waived notice and consented to the approval of the account. Notice to the specific legatees, residents in and citizens of Romania, was given by publication only. No notice was given to their counsel, other than by such publication. The final account was approved April 27, 1965.

On January 14, 1966, counsel for the specific legatees filed a motion designated "Motion to vacate order settling final account, to remove trustee, and for leave to file exceptions to final account, with brief and affidavit annexed."

A hearing on that motion was begun before the Probate Judge of Lorain County, and concluded by a Probate Judge of another county, when objection was made to the local county judge by counsel for the movants.

It is apparent that if a motion to vacate, as is filed herein, is to be upheld, it must be in accord with Section 2109.35, Revised Code. In the instant case, to vacate the

order of settlement, there must either be fraud established, or good cause shown as to why the order of approval should be set aside.

This court has read the bill of exceptions, and has examined all of the files, in the light of the charges made by the movants. We, also, have examined the memorandum opinion of Judge John W. Winn. Our examination of the matters raised in this case, compels us to agree with the reasoning, and conclusion, set out by Judge Winn in his memorandum. There appears no good or compelling reason why anything further needs to be said by this court. We must concur in the judgment rendered by him, as we find no error prejudicial to the substantial rights of the appellants.

Judgment affirmed.

APPENDIX "C."

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR LORAIN COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL AS OF RIGHT, FROM THE COURT OF APPEALS FOR LORAIN COUNTY.

This cause, here on appeal as of right from the Court of Appeals for Lorain County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Probate Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lorain County for entry.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING.

It is ordered by the court that rehearing in this case is denied.

APPENDIX "D."

RULES OF PRACTICE OF THE SUPREME COURT OF OHIO.

* * * * *

RULE I.

NOTICE OF APPEAL.

Section 1. From Court of Appeals.

(A) The notice of appeal from a Court of Appeals must be filed in the court from which the case is appealed within twenty days in a civil case (Section 2505.07, Revised Code) and within thirty days in a criminal case (Section 2953.05, Revised Code) from the entry of the judgment or final order appealed from and shall set forth:

(a) The order or judgment appealed from, and

(b) Whether the case originated in the Court of Appeals, and

(c) Whether the case involved a substantial constitutional question.

* * * * *

RULE II.

DETERMINATION OF JURISDICTION ON APPEALS FROM COURTS OF APPEAL.

* * * * *

Section 3. Consideration as to Existence of Constitutional Question.

If an appellant claims a constitutional question and also proposes to prosecute an appeal on issues of law of public or great general interest, he must file both at the same time.

Where appellant claims that he has an appeal as of right (*i.e.*, that the case involves a constitutional question), the Supreme Court will *sua sponte* consider the case as on a motion to dismiss said appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case.

* * * * *

APPENDIX "E."

SECTION 2109.35, REVISED CODE OF OHIO.

Section 2109.35. Effect of order settling account.

The order of the probate court upon the settlement of a fiduciary's account shall have the effect of a judgment and may be vacated only as follows:

(A) Such order may be vacated for fraud upon motion of any person affected thereby or upon the court's own order, if such motion is filed or order is made within one year after discovery of the existence of the fraud.

(C) Such order may be vacated for good cause shown, other than fraud upon motion of any person affected thereby who was a party to the proceeding wherein such order was made solely by reason of his having been served by publication in a newspaper in accordance with section 2109.33 of the Revised Code, if such motion is filed within one year after such person acquires knowledge of such proceeding and in any event within three years after such order is made. Such person must establish to the satisfaction of the court that he had no knowledge of the proceeding in time to appear therein.

A motion to vacate an order settling an account shall set forth the items of the account to which complaint is made and the reasons for complaining thereof, verified by affidavit.